

Michigan Journal of International Law

Volume 10 | Issue 3

1989

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Recommended Citation

Cindy A. Cohn, *Interpreting the Withdrawal Clause in Arms Control Treaties*, 10 MICH. J. INT'L L. 849 (1989).

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Note, Interpreting the Withdrawal Clause in Arms Control Treaties

Cindy A. Cohn*

In 1989, the United States finds itself torn between pursuing the wishful promises of the deployment of Strategic Defense Initiative ("SDI") and fulfilling its obligation to the 1972 Anti-Ballistic Missile Treaty (ABM Treaty)¹. In 1999, the Soviet Union may decide that heightened military tensions in the world force it to cancel further verification visits by the United States called for by the 1988 INF Treaty.² One of the scenarios exists today, the other remains a future possibility. Both, however, may lead a nation to seek to withdraw unilaterally from an arms control treaty. While negotiators and the world community hope that a state will never choose this option, the possibility cannot be overlooked.

The two treaties mentioned above, as well as five others concerned with arms control,³ contain the same withdrawal clause: "[E]ach Party shall, in exercising its national sovereignty have the right to withdraw from this Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country," (the "Extraordinary Events Clause"). When one seeks to interpret this language, however, problems arise. The language of the Extraordinary Events Clause has never been invoked nor carefully defined in international law,⁴ despite the frightening specter presented by unilateral termination of a treaty

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1. Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-U.S.S.R., art. V, 23 U.S.T. 3435, 3441, T.I.A.S. No. 7503 (1972) [hereinafter ABM Treaty]; see also Weinberger, *Arms Reductions and Deterrence*, 55 FOREIGN AFF. 700, 707-08 (1988).

2. Treaty between the United States and Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter Range Missiles, December 7, 1987, 88 DEPT. STATE BULL. 24 (Feb. 1988) [hereinafter INF Treaty].

3. Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 [hereinafter Test Ban Treaty]; *Salt II Agreement: Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms and Protocol Thereto*, Presented to the Senate Foreign Relations Comm., 96th Cong., 1st Sess. 37 (1979), (treaty never ratified) [hereinafter Salt II]; Treaty on Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483; T.I.A.S. 6839; 729 U.N.T.S. 161 [hereinafter Non-proliferation Treaty]; Treaty on the Prohibition of the Emplacement of Nuclear Weapons of Mass Destruction on the Seabed and Ocean Floor, 23 U.S.T. 701, T.I.A.S. No. 7337, 955 U.N.T.S. 115 [hereinafter Seabed Treaty]; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxic Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062 [hereinafter Biological Weapons Treaty].

4. Telephone confirmation by Geoffrey Levitt, Attorney-Advisor, U.S. Department of State (October 4, 1988).

controlling nuclear weapons. The question of which conditions it poses, if any, has never been answered.

One could argue that this ambiguity is necessary. This view rests on the realization that arms control agreements are very delicate, extremely political instruments. Definitive limits on a party's ability to invoke the Clause would be misleading as well as detrimental to future agreements since countries do not intend to be bound strictly by them. Additionally, the inclusion of the language could indicate that the parties have accepted the principle of a peremptory right to withdraw from these agreements flowing from national sovereignty and national security considerations.⁵ All of these considerations could lead one to conclude that the language should remain uninterpreted.

This Note, however, argues an opposing position. Although a danger to future arms control may exist, a treaty clause must be susceptible to interpretation and boundaries of use which are in harmony with general international law principles. As Professor Schwelb has stated: "[I]t cannot have been . . . the intention of the parties to throw the principle of *pacta sunt servanda* overboard in favor of the anarchic idea of the unfettered right of a sovereign state to free itself unilaterally from a treaty obligation."⁶ Although Schwelb admits that the Clause itself is subject to "auto-interpretation"⁷ by the states parties to the treaty, he adds that "[t]he decision must nevertheless be made in good faith."⁸

This Note explores how to find and define the conditions placed upon treaty parties for invocation of the Extraordinary Events Clause. First, it will examine the history of the Clause and survey its possible interpretations. The next section suggests that viewing the Clause in relation to the ancient customary law doctrine of *rebus sic stantibus*, now codified in the Vienna Convention on Treaties as "Fundamental Change of Circumstance," can shed light on its meaning and provide a framework for its use. Third, this framework is applied to the current debate concerning the ABM Treaty and the SDI. Although the Fundamental Change of Circumstances Doctrine is not the equivalent of the Extraordinary Events Clause,⁹ the goal is to find the issues the Clause seems to raise, using the Doctrine as a model. Two problems emerge from this model: identifying the common intentions of the parties and analyzing the transformation of the treaty obligations due to changes of circumstances.

5. See Schwelb, *The Nuclear Test Ban Treaty and International Law*, 58 AM. J. INT'L L. 642, 661 (1964).

6. *Id.* at 662.

7. *Id.* at 663, quoting Gross, *Festschrift for Kelsen*, LAW AND POLITICS IN THE WORLD COMMUNITY 76 (Lipinsky, ed. 1953).

8. *Id.*

9. See Schwelb, *supra* note 5, at 670.

Application of these two issues to situations involving the possible use of the Extraordinary Events Clause can offer an objective element to the analysis. Even with the analytical assistance of these tools, the Clause may remain hopelessly ambiguous, and one could conclude that parties seeking to withdraw from a treaty containing it should rely instead on customary means of treaty termination. Conversely, it may be that the doctrine provides some guidance. Whatever help the Fundamental Change of Circumstances Doctrine can provide, the international community needs some sort of clarification, through arbitration, further negotiation, or even unilateral statements by treaty parties, before any interpretation of the Clause can be relied upon.¹⁰

I. HISTORY OF THE EXTRAORDINARY EVENTS CLAUSE

A. *Test Ban Treaty*

The United States and the Soviet Union first used the "Extraordinary Events" language in Article IV of the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (the "Test Ban Treaty").¹¹ Since then, this language has been included in all bilateral arms agreements between the U.S. and the Soviet Union¹² and almost all multilateral arms treaties.¹³ Despite this wide use, no nation has ever invoked this language¹⁴ or specifically defined its parameters.

Secretary of State Dean Rusk first publicly presented the Extraordinary Events Clause in 1963 during the ratification hearings for the Test Ban Treaty before the Senate Foreign Relations Committee.¹⁵ Rusk emphasized the flexibility of the Clause. He noted that under the Clause, "the U.S. would need to answer to no authority other than its own conscience and requirements,"¹⁶ should it decide to withdraw from the Treaty. Although he had indicated that the U.S. subjective interpretation of the Clause should control, he later conceded that some objective boundaries did exist. In summarizing the history of the language, Rusk noted that the negotiators had inserted the Clause in

10. *Id.* at 662.

11. Test Ban Treaty, *supra* note 3.

12. This includes the Non-proliferation Treaty, *supra* note 3; Salt II, *supra* note 3; and the recent INF Treaty, *supra* note 2.

13. This includes the Seabed Treaty, *supra* note 3; Biological Weapons Treaty, *supra* note 3.

14. Telephone confirmation, U.S. Dept. of State, *supra* note 4.

15. *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater: Hearings Before Senate Committee on Foreign Relations*, 88th Cong. 1st Sess. Vol. 3 (1963) (Statement of Dean Rusk, Sec. of State) [hereinafter Rusk Testimony]. Although there is debate currently on whether the U.S. is bound to the interpretation presented at the ratification hearings for treaties, such testimony is at least evidence of interpretive intent. In this case, it is the only evidence of intent since the clause has never been invoked, and the negotiating record of the Test Ban Treaty is unavailable.

16. *Id.* at 18.

response to the Soviet view "that sovereignty permits the denunciation of a treaty in any event."¹⁷ The purpose was to ensure that the Soviet Union would not withdraw from the Treaty without objective justification:

We were not at all satisfied with that view [that sovereignty always allowed withdrawal from a treaty], because we feel this gives too little respect to international law and to the obligations of a treaty, so we felt that a withdrawal clause ought to be in, which although it is flexible, and very flexible, would make it quite clear that the *purposes* of the treaty, the *subject matter* of the treaty, and the *jeopardy to the supreme interests* of the country, would have to be involved to permit withdrawal from the treaty, and that a country could not withdraw for simply frivolous or unrelated matters as a matter of whim and still pretend that it is legal within the treaty to do so.¹⁸

Thus, even when first introduced to the Senate, the Clause was seen to have some objective parameters.

Soviet jurists do not support Secretary Rusk's description of the Soviet view of international treaty law. Tunkin emphasized that states have the duty to fulfill international treaty obligations currently in effect in good faith and in accordance with recognized principles and norms of international law.¹⁹ In relation to the Test Ban Treaty, Schwelb notes:

On the contrary, they [the Soviet jurists] always stress the predominant role international treaties play in comparison with other sources of international law . . . the Soviet Government has hardly ever publicly proclaimed so radical a view as that which it apparently held [according to Rusk's testimony] in the course of the negotiations on the Moscow Treaty [Test Ban Treaty].²⁰

While Rusk may have mischaracterized the Soviet view of international treaty law, his observation that a country cannot legally invoke the Extraordinary Events Clause on a mere whim remains unquestioned.

B. *Further Senate Testimony About the Clause*

During the ratification hearings for subsequent treaties, only brief testimony concerning the Clause was offered. No additional interpretations emerged, and witnesses consistently referred to Secretary Rusk's original testimony.²¹ A typical example is Ambassador James

17. *Id.* at 28.

18. *Id.* at 50 (emphasis added).

19. G. TUNKIN, *LAW AND FORCE IN THE INTERNATIONAL SYSTEM* 112 (English translation of the revised Russian text) (1985).

20. Schwelb, *supra* note 5, at 661.

21. See testimony concerning *Nonproliferation Treaty* [Part 1]: Hearing on Treaty on Non-Proliferation of Nuclear Weapons Before the Senate Comm. on Foreign Relations and Joint Comm. on Atomic Energy, 90th Cong., 2d Sess. (1968); *Non-Proliferation Treaty* [Part 2] Hearing Before the Senate Comm. on Foreign Relations, 91st Cong., 1st Sess (1969).

F. Leonard's²² testimony before the Senate Foreign Relations Subcommittee regarding the ratification of the Seabed Treaty.²³ Regarding the Extraordinary Events Clause, Leonard merely said: "This is a clause that has been utilized widely in other post-war arms control treaties."²⁴

C. *Comparison of the Test Ban and ABM Treaties*

The need to find a definitive, objective interpretation of the Extraordinary Events Clause has grown stronger as nations have subsequently included it in increasingly important strategic disarmament treaties. An extremely flexible, subjective interpretation of the Clause, like the "conscience and requirements"²⁵ of a state as first suggested by Secretary Rusk, could allow the Extraordinary Events Clause to become the exception that swallowed the treaty. Comparing the Test Ban Treaty's goals and subject matter with those of the 1972 ABM Treaty,²⁶ which also includes the language, reveals the need for stronger justifications in the latter treaty.

While the elimination of nuclear testing is one of the goals of the Test Ban Treaty, Secretary of State Rusk emphasized that "the primary interest has been . . . [concern about] the pollution of the atmosphere."²⁷ The ABM Treaty presents much more ambitious goals. In the preamble to the treaty, the U.S. and the Soviet Union are:

Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to take effective measures toward reductions in strategic arms, nuclear disarmament and general and complete disarmament.

Desiring to contribute to the relaxation of international tension and the strengthening of trust between States²⁸

22. Former Director of the Arms Control and Disarmament Agency and U.S. Representative to the Conference of the Committee on Disarmament.

23. See *supra* note 3.

24. *Seabed Arms Control Treaty: Hearing on the Treaty on the Prohibition of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Hearings on Ex.H. 92-1 Before the Senate on Foreign Relations Comm.*, 92d Cong., 2d Sess. 9 (1972) (Statement of James Leonard); see also memo from Charles Robinson, Deputy Secretary of State to President Gerald R. Ford, 6/22/76, folder ND20-1CO158, Box 73, WHCF, Gerald R. Ford Library (inclusion of clause in unratified Threshold Test Ban Treaty and unratified Treaty Between the United States of America and the Union of Soviet Socialist Republics on Underground Nuclear Explosions for Peaceful Purposes); *Strategic Arms Limitations Agreements: Hearing on Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty) and the Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms (Interim Agreement) Including an Associated Protocol Signed in Moscow on May 26, 1972, Before the Senate Foreign Relations Comm.*, 92d Cong., 2d Sess. 7 (1972).

25. See *supra* note 16.

26. ABM Treaty, *supra* note 1.

27. Rusk testimony, *supra* note 15, at 55.

28. ABM Treaty, *supra* note 1, at 3438.

While both treaties are important, the ABM Treaty is more directly focused on stability. ABM Treaty Chief Negotiator Gerard Smith underscored the danger of withdrawing:

Denouncing the ABM Treaty in order to permit defense of American ICBMs would open the door to Soviet ABM deployments which would reduce the retaliatory potential of all American strategic ballistic missiles, SLBMs as well as ICBMs. Such ABM deployments would be destabilizing and likely would result in higher levels of strategic forces on both sides. We should keep the ABM Treaty even if further limitation of offensive arms eludes us.²⁹

This rationale continues to support the need for the treaty. Use of the Clause in the INF Agreement and its potential use in a START treaty further amplify the need for a common interpretation.

D. *Unilateral Termination in Other Treaties*

Although many treaties explicitly provide for a method of termination outside the customary methods, few provide more than procedural guidelines. The vast majority of treaty termination clauses require only written notice.³⁰ Others make withdrawal contingent upon the parties' failure to approve modifications or amendments.³¹ The Extraordinary Events Clause is narrower. It requires that a state base its decision to withdraw on events "related to the subject matter of this Treaty." While the precise meaning of this phrase is not clear, and though it has never been invoked, inclusion of it indicates that more than written notice is needed to support the unilateral termination of a treaty.

Once one concludes that the Clause requires some justification before a state can legitimately invoke the Extraordinary Events Clause, the problem becomes more difficult. What level of justification would be needed? Is a new administration within a state reason enough to invoke the Clause? Does the loss of one of the stated treaty goals justify invocation? Can technological advances justify withdrawal? By exploring the issues raised in a fundamental change of circumstances analysis, one can begin to frame the possible answers to these questions.

29. G. SMITH, *DOUBLETALK: THE STORY OF THE FIRST STRATEGIC ARMS LIMITATION TALKS* 456 (1980).

30. See Treaty of Friendship, Commerce and Consular Rights of Feb. 22, 1926, United States - El Salvador, art. XXVIII, 7 BEVANS 521, 46 Stat 2817, 7 Treaties and Other Int'l Agreements of the U.S. 1776-1949 at 535, WHITEMAN DIGEST OF INTERNATIONAL LAW 14 at 452 [hereinafter Whiteman]; Treaty of Friendship, Commerce and Consular Rights of 1923, United States - Germany, art. XXXI, 8 BEVANS 153, 44 Stat. 2132, WHITEMAN 14 at 451; Convention Providing for the Preservation and Protection of Fur Seals, July 7, 1911, art. XVI, 1 BEVANS 804, 37 Stat 1542, WHITEMAN 14 at 449; Air Transport Services Agreement of March 27, 1946, United States - France, 61 Stat 3445, T.I.A.S. No. 1679; 139 U.N.T.S. 114.

31. Antarctic Treaty, Dec. 1 1959, art. XII(c), 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

II. FUNDAMENTAL CHANGE OF CIRCUMSTANCES

Only limited interpretative information regarding the Extraordinary Events Clause is available. Yet, the problem of weighing the justification for unilateral withdrawal from treaties is not new. International law has developed the customary doctrine of *rebus sic stantibus*, which can help define the issues involved in interpreting the Clause. Now codified in article 62 of the Vienna Convention on the Law of Treaties, this doctrine focuses on the treaty parties' intentions and the objective shift in their obligations caused by the change of circumstances to try to define the sort of change needed to justify withdrawal from a treaty. The doctrine echoes the considerations emphasized by Secretary Rusk,³² by clarifying the sorts of circumstances, other than breach by one party, in which termination is acceptable.

The doctrine evaluates the effect of a change of circumstances on treaty relationships by viewing the change in light of the shared intentions and expectations of the parties.³³ This approach is consistent with the goal of stability in treaty relationships and with the principle of *pacta sunt servanda*.³⁴ The *rebus sic stantibus* doctrine has been applied to treaties affected by situations ranging from the outbreak of major wars,³⁵ to the emergence of new states,³⁶ and to a radical change in the obligations of the parties over long periods of time.³⁷ Documentary evidence of the past sixty years shows at least eighty cases in which states have invoked the doctrine of *rebus sic stantibus*, or referred to it as a binding rule of international law.³⁸

These instances, combined with the explanations of the doctrine in the Vienna Convention on the Law of Treaties³⁹ and the Report of the International Law Commission,⁴⁰ have provided the international community with a set of objective parameters within which one may determine the proper uses of the doctrine. Although analysis of these factors will still contain a subjective element, focus on them will lessen the chance that a country will interpret the Extraordinary Events Clause according to the pure subjectivity of its changing whim. One commentator has observed:

Interpretation is an art rather than a science. A subjective element is

32. See *supra* note 18.

33. Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus)*, 61 AM. J. INT'L L. 895, 896 (1967).

34. *Id.*

35. See *infra* note 60.

36. See *infra* notes 65-67 and accompanying text.

37. See *infra* notes 89-93 and accompanying text.

38. A. DAVID, *THE STRATEGY OF TREATY TERMINATION: LAWFUL BREACHES AND RETALIATIONS* 123 (1975).

39. See Vienna Convention, *infra* note 50.

40. Gallagher, *Legal Aspects of SDI*, 111 MILITARY L. REV. 11 (Winter 1986).

never absent from it. But this inevitable subjectivity is not limitless. It is controlled in varying degrees by evidence as to the actual expectations and objectives of the parties and the other factors that may properly be taken into account.⁴¹

Accordingly, analysis of the circumstances developing around a treaty, in light of past uses of the doctrine, can give a more objective, predictable framework for interpreting the Extraordinary Events Clause.

A. History

Although the origins of the doctrine are obscure,⁴² by the 16th and 17th centuries a '*clausula*' *rebus sic stantibus* was included or implied in all treaties,⁴³ as well as all statutes, wills, contracts, privileges, oaths and sworn declarations of renunciation of rights.⁴⁴ The theory was still in a rudimentary stage in these times, however, and the scope of its exact application remains unclear.⁴⁵ In the 19th Century, *rebus sic stantibus* gained higher authority in international law. The generally recognized rule was that treaties could be terminated or modified only with the consent of the contracting parties.⁴⁶ The decision to terminate was subjective, flowing from the principle of absolute sovereignty in international law.⁴⁷

During the period between World Wars I and II, however, the international community developed a more objective interpretation of *rebus sic stantibus*.⁴⁸ In treaty interpretation, a commentator explains "[t]he new theory operates on grounds that reasonable parties would not have undertaken the obligation had they foreseen the essential conditions that moved them to conclude the treaty would change so fundamentally."⁴⁹ This shift also supports the need to use a set of objective factors in interpreting a treaty withdrawal clause.

Article 62 of the Vienna Convention on the Law of Treaties⁵⁰ re-

41. Lissitzyn, *supra* note 33, at 897.

42. Toth, *The Doctrine of Rebus Sic Stantibus in Int'l Law*, 19 JURID. REV. 56, 65 (1974); A. VAMVOUKOS, *TERMINATION OF TREATIES IN INT'L LAW, THE DOCTRINES OF REBUS SIC STANTIBUS AND DESUETUDE* 5 (1985).

43. A. VAMVOUKOS, *supra* note 42, at 10.

44. Jason de Mayno, *In primam Dig. veteris part, comment.* (1582), Fol. 140, 8-10, quoted in A. VAMVOUKOS, *supra* note 42, at 10.

45. A. VAMVOUKOS, *supra* note 42, at 11; Toth, *supra* note 42, at 68.

46. A. VAMVOUKOS, *supra* note 42, at 188.

47. A. DAVID, *supra* note 38, at 27.

48. Toth, *supra* note 42, at 71-76. For adoption of the theory of objective rule see, e.g., Waldock, *Second Report on the Law of Treaties* [1963] 2 Y.B. INT'L L. COMM'N 36, 83, U.N. Doc. A/CN.4/156 and Add. 1-3; see also TING-YOUNG HUANG, *THE DOCTRINE OF REBUS SIC STANTIBUS IN INTERNATIONAL LAW* 10 (1935).

49. A. DAVID, *supra* note 38, at 31-2.

50. Vienna Convention on the Law of Treaties, May 22, 1969, art. 62, U.N. Doc. A/Conf. 39/27 (1969) in 8 INT'L LEGAL MATERIALS 702 (1969).

flects the shift to an objective format.⁵¹ To stress the objective character of the rule, the Commission decided not to use the term *rebus sic stantibus* in the text and title of the article.⁵² The Commission entitled the article "Fundamental Change of Circumstance," and defined the situations where change of circumstances would justify withdrawal from a treaty:

1. A Fundamental Change of Circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
 - a. the existence of those circumstances constituted an essential basis of the consent of parties to be bound by the treaty; and
 - b. the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
 - a. if the treaty establishes a boundary; or
 - b. if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.⁵³

Although neither the U.S. nor the Soviet Union have ratified the Vienna Convention, both acknowledge its use as a codification of custom.⁵⁴

The Soviet Union's view of the doctrine has consistently been more restricted than that of Western voices, but they have always accepted the need for treaty parties to react to a changing world. In 1955, Lisovskii echoed a common fear that the doctrine would soften the impact of treaty law when he stated: "exploiting states often make use of the *rebus sic stantibus* clause in rupturing an international treaty."⁵⁵ Triska and Slusser note, however, that even the earlier Soviet writers found that the socialist principle of respecting treaties must not be

51. For a criticism of the attempt to objectify the doctrine, see Lissitzyn, *supra* note 33 at 912-22.

52. Toth, *supra* note 42, at 167.

53. Vienna Convention, *supra* note 50, at 702. A close examination of the text of article 62 reveals an important overriding observation aside from the shift to an objective standard. The article is cast in the negative. It states that a change of circumstances does not constitute a legal ground for withdrawal unless certain conditions have been fulfilled. This reflects the concern of many countries that the rule would be subject to abuse if not made as restrictive as possible. Accordingly, the application of the principle in article 62 is restricted to cases which satisfy the two requirements of subsection (a) and (b) of paragraph one. Only a change in the circumstances which constituted an essential basis of the parties' consent is considered in applying the rule.

54. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW CASES AND MATERIALS* 387 (2d ed. 1987).

55. See J. TRISKA & R. SLUSSER, *THE THEORY, LAW AND POLICY OF SOVIET TREATIES* 139 (1962).

viewed as absolutely prohibiting changes under any circumstances.⁵⁶ While the Soviet jurists have found Western proposals of the principle to be too revolutionary,⁵⁷ the Soviet delegate to the 1968 U.N. Vienna Conference on the Law of Treaties spoke favorably of the fundamental change of circumstances article.⁵⁸

Under the standard set by article 62, the basic requirement for treaty termination is that a "fundamental," "substantial," "essential," or "radical" change in the circumstances which existed at the time of signing of the treaty must occur to permit invocation of the doctrine.⁵⁹ This change occurs when unforeseen conditions related to the subject matter of the treaty undermine the common intentions of the parties, or radically increase the burden brought by the treaty on one or more of the parties. These abstract descriptions can be understood better in light of some historical examples. These examples, in turn, can help one analyze some of the possible justifications for invoking the Extraordinary Events Clause.

B. *Examples of Fundamental Change of Circumstances Analysis*

1. *Political Changes Outside the Agreement*

Certain changes in the internal and external politics of a nation have merited the invocation of the Fundamental Change of Circumstances Doctrine. These shifts include war or instances when former colonies obtain statehood. The claim has not been accepted when a state has changed governments through internal political processes, although the Soviet Union has supported a version of a fundamental change of circumstances argument when a country undergoes a complete social revolution.

a) *War*

War between nations party to a treaty clearly supports a claim of changed circumstances. The 1941 U.S. Suspension of the Load Line Convention serves as the classic example of U.S. invocation of the *re-*

56. *Id.*

57. See R. ERICKSON, INTERNATIONAL LAW AND THE REVOLUTIONARY STATE 75 (1972).

58. Mr. Kovalev (U.S.S.R.), U.N. Vienna Conference on the Law of Treaties, U.N. Doc. A/CONF.39/11 at 374, no. 43, 44 (May 10, 1968).

59. A. VAMVOUKOS, *supra* note 42, at 188. David points out that the problems plaguing this "objective" standard are that the definitions of terms are subjective, and thus direct the focus of analysis away from the substantive merits of the disputes. He adds:

The question of what is an important change is senseless unless we attach significance to certain goals and come to grips with the social impact of these changes on the realization of such goals and policies. Lacking any common criteria of what is fundamental, decision makers attach significance to certain changes through the screen of their own pursued and perceived values. After all, the very fact that parties are in conflict about the continuous enforcement of an agreement means that they attach degrees of importance to certain circumstances

A. DAVID, *supra* note 38, at 49.

bus sic stantibus doctrine.⁶⁰ Due to the outbreak of World War II, President Roosevelt suspended the multilateral shipping treaty on August 9, 1941 "for the duration of the present emergency."⁶¹ When the twenty-nine nations negotiated the agreement in 1930,⁶² they did not foresee World War II. The parties entered the treaty to ensure the safety of ships on the high seas. As the Acting Attorney General Biddle stated to the President in an Opinion of July 28, 1941: "[I]n short the implicit assumption of normal peacetime international trade, which is at the foundation of the Load Line Convention, no longer exists."⁶³ Thus, changes in circumstances brought about by unforeseen occurrences undermined the basic purposes of the treaty. The wartime conditions also radically increased the extent of the treaty obligations because the U.S. needed to ferry huge quantities of war material overseas.⁶⁴ War would also undoubtedly merit invocation of the Extraordinary Events Clause.

b) *New Statehood*

New statehood for former colonies has also been accepted as grounds for application of the doctrine *rebus sic stantibus*; it serves as an appropriate analogy for the Extraordinary Events Clause by showing that changes which so drastically affect a country can destroy the common intentions of the parties. One example of this is the nullification of the Anglo-Portuguese Treaty of 1815 after the separation of Brazil from Portugal in 1822.⁶⁵ In this as in other cases,⁶⁶ Portuguese courts recognized that the independence of the former colonies resulted in both the loss of the parties' common intentions and the great change in the extent of obligations since an entirely new government had emerged. The changed circumstances claim in these cases, called the "clean slate" view, now represents international custom.⁶⁷

60. Int'l Load Line Convention of July 5, 1930, 2 BEVANS 1076, 47 Stat 2228.

61. *Id.* 14 WHITEMAN, *supra* note 30, sec. 40, at 485 (1970). On December 21, 1945, President Truman revoked the proclamation.

62. A. VAMVOUKOS, *supra* note 42, at 103.

63. *Quoted in* 14 WHITEMAN *supra* note 30, at 484-85.

64. Gross, *Negotiated Treaty Amendment: The Solution to the SDI-ABM Treaty Conflict*, 28 HARV. INT'L L. J. 31, 51 (Wint. 1987).

65. Amin, *The Theory of Changed Circumstances in International Trade*, LLOYD'S MAR. & COM. L.Q. 577, 581 (Nov. 1982).

66. *See* Carvalho v. Hull Blyth (Angola) Ltd., 3 All E.R. 280 (1979). In this case, a British court refused to grant a stay of action because of the new statehood of Angola. The court said that due to the independence of Angola from Portuguese rule, the District Court in Angola had changed completely from the court specified in the contract as controlling litigation, thus creating a situation drastically different from that anticipated by the parties.

67. For discussion by the International Law Commission see *Succession of States in Respect of Treaties*, [1974] 1 Y.B. INT'L L. COMM'N 157, 211, 217, 237, 239, U.N. doc. A/CN.4/275 and

c) *Internal Revolution*(1) *Western Views*i) *U.S. and Iraq*

The U.S. has viewed internal changes in the administration of a state, even those as drastic as revolutions, skeptically as bases for claims of changed circumstances. These shifts would also offer weak support for use of the Extraordinary Events Clause. An example of the U.S. position is the 1959 Exchange of Notes with Iraq after that country had undergone a revolution. In 1959 Iraq gave notice to terminate a 1954 Military Assistance Agreement,⁶⁸ along with certain other agreements, stating that the agreement was "no longer in harmony with the realities of Iraq after the Revolution of July 14, 1958, because of the 'change of circumstances.'"⁶⁹ Although the U.S. ended the agreements, the State Department rejected the changed circumstances argument, saying it "cannot concur . . . on the basis therein described."⁷⁰ This denial stemmed from the treaty custom which holds that internal political changes do not affect treaty validity.⁷¹

ii) *Bell v. Iran*

U.S. courts have recently confirmed the view expressed by the State Department in 1954. In *American Bell International v. Islamic Republic of Iran*,⁷² Bell argued that a service contract with the Iranian government should be invalidated because of the recent revolution in Iran. The court held that since the U.S. government had officially recognized the Islamic Republic of Iran as legal successor to the Shah's regime, the Iranian courts should continue to use Iranian law to adjudicate any disputes arising under the contract.⁷³ The contract was made on July 23, 1978,⁷⁴ and while the court noted the "credible evidence that the Islamic Republic is xenophobic and anti-

Add. 1 and 2; A/CN.4/278 Add. 1-5; a/8710/Rev.1, see also Waldock, *Gen. Course on Int'l L.*, 106 REC. DES COURS 1, 49-53 (1962-II); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 210 (1986).

68. Military Assistance Agreement, Apr. 21, 1954, United States — Iraq, 5 U.S.T. 2496; T.I.A.S. No. 3108.

69. *Id.*

70. 14 Whiteman at 487.

71. "The rights, capacities and obligations of a state appertain to the state as such and are not affected by changes in its government." L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 54, at 266.

72. *American Bell International v. Islamic Republic of Iran*, 474 F.Supp. 420 (S.D.N.Y. 1979) [hereinafter *Bell*].

73. Amin, *supra* note 65, at 584.

74. *Bell*, *supra* note 72, at 421.

American,"⁷⁵ it would not invalidate the contract because of the 1979 revolution. U.S. recognition of the new Iranian government as legal successor affirmed that insufficient change in the Iranian historical setting had occurred to warrant termination of the contract obligations.

iii) *U.S.S.R. and Iran*

Changes within the internationally recognized governments of treaty parties have never supported a claim of changed circumstances. Professor Reisman,⁷⁶ however, has suggested that Iran could invoke the doctrine to escape a 1921 treaty which had granted the Soviet Union a discretionary right of military intervention in Iran should Moscow conclude that certain interests are "menaced." An annex to the treaty adds that preparations for a "considerable armed attack" would justify such intervention.⁷⁷ In 1979, Iran announced abrogation of the intervention part of the treaty, but did not invoke article 62.

Reisman subsequently argued that the situation would merit use of article 62 since both Iranian and Soviet politics had changed drastically after the formation of the treaty. The Soviet Union stabilized its internal politics and developed a stronger foreign policy in the period between the unstable years following the Bolshevik Revolution and 1979. Reisman notes that the parties' common intentions had been lost and that their obligations had changed. Iran no longer needed the protection of Soviet armed military intervention, and feared Soviet misuse of the treaty against Iran.

(2) *U.S.S.R. view*

i) *Socialist Revolution (State Succession)*

While the Soviet jurists look skeptically upon the general Fundamental Change of Circumstances Doctrine,⁷⁸ their view of the concept in relation to fundamental changes in the social system is more liberal. When a social revolution changes a state from one historical form to another, as did the Revolution of 1917, a new state arises which must be free from the treaties concluded by its predecessor.⁷⁹ In these situations, however, the Soviets would limit the types of change which would be acceptable within the scope of the doctrine.

75. Bell, *supra* note 72, at 423.

76. Reisman, *Termination of the USSR's Treaty Right of Intervention in Iran*, 74 AM. J. INT'L L. 144 (1980).

77. Treaty of Friendship, Feb. 26, 1921, Persia - Russian Socialist Federal Republic, 9 LNTS 384, in Reisman, *supra* note 76, at 145.

78. See *supra* notes 55-58 and accompanying text.

79. R. ERICKSON, *supra* note 57, at 80-81.

At the 1966 Helsinki Meeting of the International Law Association, Professor I. I. Lukashuk explained: "I mean, of course, not a political coup, but such a deep revolution as changes the very foundation of the state — its social, economic and political foundations."⁸⁰

d) *Policy Shifts Short of Revolution*

International custom holds that a duly elected government is bound by its predecessor's treaties, and dictates that this domestic change does not constitute the "fundamental" change necessary for invocation of the doctrine.⁸¹ In this, the Soviet jurists agree with Western analysts and the International Law Commission. The Commission chose the name "Fundamental Change of Circumstances" for article 62 in order to "exclude abusive attempts to terminate a treaty on the basis merely of a change of policy."⁸² No claims of changed circumstances based solely on policy shifts within a state have succeeded in permitting a state to justify termination of a basic treaty obligation.

2. *Basis of Treaty Agreement Lost*

a) *Fisheries Jurisdiction*

In 1973, the International Court of Justice ("ICJ") emphasized that *all* goals upon entering a treaty must be lost for a claim of "Fundamental Change of Circumstances" to succeed.⁸³ In the *Fisheries Jurisdiction* case, Iceland sought to invalidate a 1961 Exchange of Notes which limited Iceland's exclusive fisheries jurisdiction to a twelve-mile zone from its shores and mandated ICJ jurisdiction for any disputes.⁸⁴ The ICJ agreed with Iceland that international law had increasingly recognized claims of jurisdiction beyond the twelve-mile zone. The Court stated that "it is unlikely that the new agreement would have been made if the Government of Iceland had known how matters would resolve."⁸⁵ Despite this recognition, however, The ICJ refused Iceland's claim of termination by changed circumstances.

The Court explained that a state's intentions upon entering a treaty must be determined not only from the text, but also from the whole set

80. Lukashuk (U.S.S.R.), *Report of the 52nd Conference, Helsinki* 562 (1966) quoted in *id.* at 83.

81. *Id.* See also L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 54, at 507.

82. [1963] 2 Y.B. INT'L L. COMM'N 210, U.N. Doc. A/5509.

83. *Fisheries Jurisdiction* (U.K. v. Ice.) 1973 I.C.J. 3, 21 [hereinafter *Fisheries Jurisdiction*].

84. *Id.* at 6-9.

85. *Id.* at 17-18.

of circumstances surrounding the agreement. In its examination of those circumstances, the Court found that the parties sought two objectives: immediate recognition of Iceland's twelve mile jurisdiction and the securing of a "means whereby the parties might resolve the question of the validity of any further claims."⁸⁶ These objectives induced the parties to agree to the 1961 Exchange of Notes. Although the ICJ agreed that the first objective may have "disappeared altogether,"⁸⁷ it explained: "this is not a ground justifying repudiation of those parts of the agreement the object and purpose of which have remained unchanged."⁸⁸

b) *Termination of the Black Sea Agreement*

The Black Sea Agreement portion of the 1856 Treaty of Paris⁸⁹ required absolute neutrality in the Black Sea between the parties to the Agreement — Turkey, Great Britain, Austria-Hungary, Prussia, France, Russia and Sardinia.⁹⁰ Fourteen years after the treaty was enacted, Russia declared her intent not to be bound. She based this refusal on three changes in circumstances: (1) the union of Moldavia and Wallachia by a series of revolutions; (2) the admission to the Black Sea of foreign warships; and (3) the introduction of iron-clad ships.⁹¹ All of these, she claimed, made it difficult to "retain the moral validity which it [the Treaty Conventions respecting the neutrality of the Black Sea] may have possessed at other times."⁹² Russia emphasized that growing military tensions in the area (she was already at war with France) had resulted in the loss of the parties' common intentions. Because Russia's claim of *rebus sic stantibus* would have terminated the treaty, all of the parties signed a new treaty in order to maintain the agreement.⁹³

3. *Technological Advances*

The Termination of the Black Sea Agreement also exemplifies the claim that technological advances can undermine the parties' common intentions and increase the burden of a treaty. The introduction of

86. *Id.*

87. *Id.* at 18-19.

88. *Id.*

89. Treaty of 30 March 1856, art. 11, 13-14, 46 BRITISH AND FOREIGN STATE PAPERS 22 (1865).

90. *Id.* See also A. VAMVOUKOS, *supra* note 42, at 67.

91. T. YU-HAO, THE TERMINATION OF UNEQUAL TREATIES IN INTERNATIONAL LAW 75 (1933).

92. Note of Prince Gortchakoff of October 19-31, 1870, *quoted in* T. YU-HAO, *supra* note 91.

93. A. VAMVOUKOS, *supra* note 42, at 70.

iron-clad ships, especially in light of the heightened tensions in that area, was one of the factors which Russia mentioned in her denunciation. "The introduction of iron-clad vessels, unknown and unforeseen at the conclusion of the Treaty of 1856, increased the danger for Russia in the event of war, by adding considerably to the already patent inequality of the respective naval forces."⁹⁴

This example is difficult to apply to modern situations. The termination occurred in 1870, when a states' subjective interpretation of the binding force of treaty was controlling.⁹⁵ It also concerns a very politicized decision. Despite these factors, the incident is the only one seen in the doctrine's history which specifically mentions that technological changes can affect the obligations which a treaty places on parties. In the arms control context, this argument is more easily applied.

III. USING THE FRAMEWORK: THE EXAMPLE OF THE ABM DEBATE

A. *The ABM Treaty Dispute*

Applying the Fundamental Change of Circumstances analysis to a situation involving a treaty containing the Extraordinary Events Clause highlights the usefulness of the doctrine. The present debate between the U.S. and the Soviet Union over the application of the ABM Treaty to the SDI provides an example of this analysis. The past uses of the doctrine can demonstrate the types of extraordinary events which might qualify as acceptable reasons for invoking the Clause. This inquiry focuses on the common intentions of the parties and the transformation of the obligations since the treaty was signed.

Although voices within the U.S. and the Soviet Union have disagreed about when development and testing of SDI violates the treaty, authorities do agree that no interpretation of the ABM Treaty would allow either party to deploy defensive systems in space like those being studied.⁹⁶ Under the restrictive interpretation favored by some members of Congress, the treaty prohibits SDI when it prohibits all but future land-based ABMs.⁹⁷ This is because the definition of ABMs

94. Correspondence respecting the Treaty of 1856, 3 MAP OF EUROPE BY TREATY 1892-95 (E. Hertslet, ed.) quoted in A. VAMVOUKOS, *supra* note 42, at 67.

95. See *supra* notes 46-47 and accompanying text.

96. See Cushman, *Preliminary Tests Gain Approval in 'Star Wars'*, N.Y. Times, Sept. 19, 1987, at 5, col. 2; *Hearings on Military Implications of the Treaty on Limitations of Anti-Ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms Before the Senate Comm. on Armed Services*, 92d Cong., 2d Sess. 287 (1972) (statement by Gerard C. Smith); Speech by Paul H. Nitze, Johns Hopkins University School of Advanced International Studies 3 (April 1, 1987).

97. Article V says "Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based or mobile land-based." ABM Treaty, *supra* note 1, art. V, para. 1.

referred to in article V⁹⁸ refers to both the current ABM components listed as well as all those which may be developed in the future.⁹⁹ In addition, Agreed Statement D attached to the treaty addresses the SDI issues by prohibiting ABM systems "based on other physical principles."¹⁰⁰ Even if it can be shown that SDI is based on physical principles developed after 1972, it would be covered by the treaty.

In contrast, the Reagan Administration proposed a broad interpretation which finds that Agreed Statement D reserves judgment on later weapon systems.¹⁰¹ State Department Legal Advisor Sofaer argues that the ABM "systems" or "components" prohibited in article V are only those listed in the definition of ABMs contained in article II(i).¹⁰² Under either interpretation, however, the basic principle of the treaty — that neither side may deploy systems or components without amendment to the treaty¹⁰³ — has not been questioned.¹⁰⁴

Work on the SDI program has now reached a phase of development labeled "demonstration and validation."¹⁰⁵ Former Defense Secretary Caspar W. Weinberger said that, with an immediate start, the first phase of a missile defense system could be put into operation

98. The definition is contained in art. II, para. 1: "For purposes of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of: (a) ABM interceptor missiles . . . (b) ABM launchers . . . , and (c) ABM radars" ABM Treaty, *supra* note 1.

99. The result of this reading is two-fold. First, except in case of fixed land-based systems, parties may only test experimental ABMs in the laboratory. Second, parties cannot give non-ABM missiles ABM capability (to counter strategic ballistic missiles or their elements in flight trajectory) or test any missile launcher or radar "in an ABM mode."

In a recent article, Professor Chayes finds that the ABM treaty is at risk. First, he notes that the objective of the program as defined by the President is illegal under the treaty since article I states "[e]ach party undertakes not to deploy ABM systems for a defense of the territory of its country" and that is the main objective of the SDI program as presented by President Reagan. Second, he explains that many of the tests of Anti-Satellite Systems (ASAT) and Anti-Tactical Ballistic Missile Systems (ATBM) are identical to those necessary for ABM development as well as SDI. He examines the recent statements by the U.S. that it is not yet violating the treaty, and concludes that even if the U.S. is not yet technically violating the treaty, it clearly will be in violation of it in two to three years at most. Chayes, *Dyson Distinguished Lecture: The ABM Treaty and the Strategic Defense Initiative*, 5 PACE L. REV. 735 (1985).

100. Agreed Statement D, ABM Treaty, *supra* note 1.

101. See Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972, 1973 (1986).

102. Sofaer says that the list was not meant to extend into the future. First, the Agreed Statement specifically allows for "creation" of technologies based on "other physical principles", and only limits the development and deployment. He argues that this qualification wouldn't be necessary if article V was future-encompassing.

Second, he finds that the word "currently" is meant to limit the definition of ABMs to those available subsequently listed as available now. He supports this interpretation by saying that (1) the rest of the treaty refers to "system" only in the present tense, never projecting it into the future, and (2) article IV limits itself to the word "launchers," which does not allow for future technologies. *Id.*

103. Art. III makes an exception for one remaining land-based system on each side. ABM Treaty, *supra* note 1.

104. Nitze, *supra* note 96; Smith, *supra* note 96.

105. Cushman, *Preliminary Tests Gain Approval in 'Star Wars'*, *supra* note 95, at col. 1.

as early as 1994.¹⁰⁶ Though many members of the Administration have given ambiguous answers when questioned as to the progress of SDI, former National Security Advisor Carlucci indicated a clear purpose: "We've never made any bones about the Strategic Defense Initiative. We intend to develop it as rapidly as we can and deploy it when it is ready."¹⁰⁷ Thus, when it deploys space-based weapons, the U.S. will be in direct violation of the Treaty under either the broad or narrow interpretation of the ABM Treaty.

B. *Applying the Factors to the ABM Dispute*

The U.S. could support an invocation of the Extraordinary Events Clause with three main claims of changes since the ABM Treaty was concluded. First, the parties have experienced internal political changes. Second, the underlying intentions of the Treaty are no longer present. Third, the technological advances since the conclusion of the treaty have radically changed the treaty obligations of the states. An examination of each of these arguments will show how the analysis of the parties' intentions, and the objective transformation of their obligations since the Treaty was signed, in light of past uses of the Fundamental Change of Circumstances doctrine, can provide an analytical framework in which to apply the Extraordinary Events Clause.

1) *Political Changes*

When one compares the examples given, the positions of the U.S. and Soviet Union have not shifted enough to warrant withdrawal from the treaty under article 62. The ABM treaty has functioned for only sixteen years and neither party has been involved in a major war, emerged as a new state, or undergone a fundamental social revolution in the interim. As in the situation between Iran and the U.S.,¹⁰⁸ both states have recognized each other's successor governments. Although both have undergone leadership changes, these have not been as extensive as the changes which have been seen in the history of the doctrine.

In applying the Extraordinary Events Clause, one would evaluate how the shifts have affected the common intentions of the parties. Taking the declared intentions on the face of the treaty,¹⁰⁹ it is difficult to argue that new administrations of Gorbachev, Reagan, and Bush have altered the desires to end the nuclear arms race, reduce strategic arms or strengthen trust between nations. The continuing efforts by their two administrations to reach strategic arms agreements such as

106. *Id.* at col. 3.

107. Remarks made on Sept. 20, 1987 "Meet the Press," quoted in Gordon, *Senate Committee Threatens Delay of New Arms Pact*, N.Y. Times, Sept. 21, 1987, at 6, col. 5.

108. *Bell, supra* note 72.

109. See *supra* note 28 and accompanying text.

INF and START would argue for just the opposite.¹¹⁰ Additionally, the strong international law tradition, which precludes changes in treaty status based on political changes, further discourages invocation of the Extraordinary Events Clause based on political shifts within the two countries.

2) *Basis of Treaty Agreement Lost*

In the ABM Treaty example, an Extraordinary Events Clause invocation could be based on three claims that focus on the underlying reasons for the agreement. The strongest would be that further negotiation was a condition of the treaty. The U.S. issued a unilateral statement with the treaty which emphasized the goals of further negotiation and reduction to "achieve more complete limitations of strategic arms."¹¹¹ It warned that if an "agreement providing for more complete strategic offensive arms limitations were not achieved within five years, U.S. supreme interests could be jeopardized,"¹¹² constituting a basis for withdrawal.¹¹³

A second element would be that the strategic conditions upon which the treaty was concluded have been materially altered.¹¹⁴ Former Secretary of Defense Caspar Weinberger¹¹⁵ has suggested that the ABM Treaty was based on the theory of mutual assured destruction ("MAD"),¹¹⁶ and then "Secretary of Defense Robert McNamara's belief that the Soviet Union would be satisfied with the concept of deterrence based on parity once it achieved nuclear equality with the United States."¹¹⁷ Weinberger feels that McNamara seriously misjudged the Soviet Union, and that this misjudgment justifies use of the Extraordinary Events Clause: "We should be discussing opening up a new strategic relationship and a defensive transition, not quibbling over legalistic, hazy interpretations [of the ABM Treaty] which effectively preserve the mistakes of the past and endanger our future security."¹¹⁸ This reasoning further supports the third claim supporting

110. See Nelson, *Two Leaders Stress Gains at Summit, Rights, Regional Issues Cited; Further Arms Talks Called Vital*, L.A. Times, June 2, 1988, § 1, at 1, col. 5; Pond, *Ronald and Mikhail: The Summer of Their Content — And a New Detente*, Christian Sci. Monitor, June 16, 1988, at 16.

111. Unilateral Statement A, ABM Treaty, *supra* note 1.

112. *Id.*

113. *Id.*

114. Weinberger, *supra* note 1, at 706.

115. Caspar Weinberger was Secretary of Defense from 1981 to Nov. 1987.

116. This theory set a finite limit on the number of U.S. missiles at the number needed to ensure a devastating American retaliatory strike on the Soviet Union after any initial Soviet attack. Its basis is a condition of mutual vulnerability. Pond, *Superpower Leadership on the Line at Summit; Soviets Yielded Most on Road to Summit*, Christian Sci. Monitor, Dec. 7, 1987, at 1.

117. Weinberger, *supra* note 1, at 707.

118. *Id.* at 707-08; see also Pond, *supra* note 116, for a discussion of the demise of the MAD theory.

invocation of the Clause. Weinberger adds that the subsequent Soviet expansion of their nuclear arsenal testifies to McNamara's misjudgment.¹¹⁹ The argument is that the treaty was negotiated during a time of rough strategic parity which has since been lost.

Several factors would complicate these claims, however. First, when the five-year mark was reached in 1977, the U.S. made no effort to withdraw from the treaty. The INF Agreement also reflects exactly the goal stated in the U.S. unilateral statement — a subsequent agreement which not only limits, but reduces the number of weapons possessed by each country.¹²⁰ In addition, the research and development of SDI subsequent to the treaty's conclusion violates the spirit of further limitations emphasized by the statement; it does not lead to the invocation of the Clause. Since increased work with SDI runs counter to the declared intentions of the treaty,¹²¹ the U.S. would seem specious to use its own violation to justify the invocation of the Extraordinary Events Clause because a further agreement has been difficult to achieve. The policy change from the fundamental policies underlying the treaty, as explained by former Secretary of Defense McNamara, would be troublesome, since these were not the sole reasons for concluding the treaty.¹²² The general custom preventing internal political changes from altering a state's treaty obligations would look disfavorably on a claim that an "extraordinary event" had occurred.¹²³ Additionally, as one commentator has said: "a state cannot alter a factor entirely within its control and claim that a 'change' renders a prior treaty obligation oppressive."¹²⁴

The claim of Soviet domination in strategic nuclear devices also presents difficulties due to the lack of accurate information. Many commentators claim that rough parity still exists between the two nations.¹²⁵ They note that the U.S. has matched Soviet efforts in offensive missile capabilities by hardening ICBM silos and embarking on two offensive programs of its own: the MX and Midgetman missile systems.¹²⁶ Others claim that the Soviet expansion of conventional forces has altered the obligations of the U.S. to refrain from developing systems such as SDI, since it means that the U.S. must fall behind in the arms race.

119. See Weinberger, *supra* note 1, at 707.

120. See *supra* note 2.

121. See *supra* note 28 and accompanying text. "The basic premises of the ABM Treaty are that there will be less need for additional offensive weapons, the strategic balance will be more stable, and each side will be more secure if systems designed to defend against strategic weapons are substantially prohibited." Chayes, *supra* note 99, at 737.

122. See *supra* note 1 and accompanying text (intentions of the ABM Treaty).

123. See *supra* notes 80-81 and accompanying text.

124. Gross, *Negotiated Treaty Amendment*, *supra* note 64, at 59.

125. *Id.*

126. *Id.*

3) *Technological Advances*

A final basis for invoking the Extraordinary Events Clause would be that the technological advances of the past sixteen years have destroyed the common intentions and changed the obligations of the treaty. This may allow for use of the Clause. The U.S. could argue that as SDI research progresses, its obligation to refrain from deploying an ABM system expands, and that the intention of the parties did not encompass the tremendous growth of SDI technology. The treaty would not have been signed had the parties foreseen this growth.

Schwelb finds that the Extraordinary Events Clause is framed flexibly to address exactly this situation. He says, "[I]mportant new technical developments in the fields of nuclear or conventional weapons . . . would, in this writer's view, be reasons justifying withdrawal by that party."¹²⁷

One problem with calling this growth an "extraordinary event," however, is that even though SDI has only formally existed since 1983, many of its technologies are based on ideas and techniques which were developed a decade or two earlier.¹²⁸ The experiments which have tested new missile guidance and control systems employ the same basic technologies as those in ICBM interception.¹²⁹ All were begun prior to the treaty.

In addition, Agreed Statement D to the ABM Treaty explicitly deals with "ABM systems based on other physical principles," foreseeing the directed energy principles of SDI.¹³⁰ Negotiator Nitze recently related that during the treaty negotiations the Soviets "suggested that if systems or components based on other physical principles were created in the future we (the U.S. and Soviet Union) should discuss the matter in the Standing Consultative Commission to be created under Article XIII."¹³¹ Though one could argue that the parties did not foresee the exact shape or scope of these future systems,

127. Schwelb, *supra* note 5, at 663.

128. For example, under the Project Defender program, established in 1958, a weapon called the Ballistic Missile Boost Interceptor (Bambi) was developed. The weapon, propelled by a chemical rocket, would collide with a launched Soviet missile and destroy it. To improve the chances of intercepting a missile, Bambi would release an 18-m diameter wire net studded with steel pellets, just before the collision. In June, 1984, in the HOE test, an atmospheric, non-nuclear infrared homing missile based on the Bambi project, destroyed a dummy warhead over 100 miles above the earth, by unfurling a fifteen foot umbrella-like impact net in the warhead's path. B. Jasani, *Current Military Activities in Space and Their Implications*, (Oct. 1987 (paper presented at McGill University, at 7-8)).

129. *Id.* at 8.

130. Agreed Statement D, ABM Treaty, *supra* note 1; see also *Strategic Arms Limitation Agreements, Hearings Before the Senate Comm. on Foreign Relations*, 92d Cong., 2d Sess. 20 (1972) (statements of Secretary of State Rogers & Gerard C. Smith, Director U.S. Arms Control and Disarmament Agency).

131. Nitze, *supra* note 96, at 11.

it is quite clear that both knew that systems such as SDI would be explored and that they chose language in an attempt to address such explorations.

Nitze stressed that the negotiators did address the issue of withdrawal due to creation of components like SDI. He states that the Soviets suggested that either side could withdraw from the treaty if they failed to achieve agreement on such components in the Standing Consultative Commission.¹³² The United States negotiators felt that would be too extreme a remedy. Accordingly, Agreed Statement D mandates renegotiation by the parties in response to the development of a system based on other physical principles.¹³³

Finally, the parties' obligations rest on the fundamental assurance they sought by entering the treaty. The assurance was that "the other side was not planning an ABM system — not putting itself in a position where it could break out, that is abrogate or withdraw from the treaty and quickly deploy a system."¹³⁴ Lissitzyn, however, has noted that "a change of circumstances may be invoked even if it was not 'unforeseen' in an absolute sense [when t]he parties may have been aware of the possibility of the change but for various reasons failed to provide for it expressly;"¹³⁵ the argument would be difficult to advance in the present situation. Successful application would require claiming that the new technology is an extraordinary event despite the fact that it was foreseen, provided for, and runs counter to the intentions of the treaty.

IV. CONCLUSION

Conclusions about how the Extraordinary Events Clause should be interpreted remain ambiguous. The fact that it exists, however, cannot be overlooked. Even if the Clause is meant to maintain flexibility, the Fundamental Change of Circumstances analysis can help frame the issues by focusing attention on the common intentions and transformation of obligations. As Professor William Bishop noted, "Indeed, it must be seen that the problem of change of conditions, or of obsolete treaty obligations is merely one aspect of the broader problem of *peaceful change* in international relations."¹³⁶ Use of the Clause by the United States to withdraw from the ABM Treaty would probably be inconsistent with an interpretation of the Clause which is based upon the Fundamental Change of Circumstances analogy. The common intentions and obligations of the parties remain largely the same.

132. *Id.*

133. *See id.*

134. Chayes, *supra* note 99, at 745.

135. Lissitzyn, *supra* note 33, at 912.

136. Bishop, *General course on International Law*, 115 REC. DES COURS 361 (1965-II) (emphasis in original).

The ABM Treaty analysis provides only an illustration, however. This Note concludes that, due to the extreme importance of the treaties which contain the Clause and the growing number of ambiguous areas such as the SDI issue,¹³⁷ some parameters must be set in order to provide essential clarification. Although some ambiguities may be desirable in the interest of national security, the treaties are not fully functional when they contain undefined language which could endanger the stability they seek. Parameters could be set by unilateral statements by the parties as to their interpretations of the Clause,¹³⁸ through further negotiation, or by a mutually agreed upon arbitration proceeding. Although nowhere in the world do things stay the same, in the volatile realm of arms control treaties the dangers of changed circumstances are truly frightening. While the nations of the world may not be able to ensure peace, the international community should at least strive to ensure mutual understanding of the agreements which are made in the hope of avoiding nuclear destruction.

137. Another possible area of disagreement would be the many pitfalls of the INF's verification procedures.

138. Unilateral statements were included by the U.S. with the original ABM Treaty text, *supra* note 1.